OCTOBER TERM, 1969

Supreme Court of the United States

LOUIS S. NELSON, WARDEN, PETITIONER

v.

JOHN EDWARD GEORGE, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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United States Court of Appeals
for the Ninth Circuit

No. 22,851

John Edward George,
Appellant,

vs.

Louis S. Nelson, Warden, California State Prison, and Warden of North Carolina State Prison,
Appellees.

RELEVANT DOCKET ENTRIES

May 10, 1968—Record filed.

May 21, 1968—Supplemental Record filed.

June 13, 1968—Motion to Remand to District Court filed by appellant.

July 1, 1968—Opposition to "Motion to Remand to District Court" and motion to dismiss appeal filed by appellee Neson.

July 12, 1968—Order to pass matter to hearing on merits filed; appellant's Motion to Remand to be treated as opening brief; Appellee to file any reply within 30 days.

July 22, 1968—Closing brief for appellant and/or Opposition to "Motion to Dismiss Appeal" filed.

September 6, 1968—Anwering Brief filed by Appellee Nelson.

February 3, 1969—Motion for appointment as counsel of record, for appearance of counsel at oral argument and for leave to file supplemental brief is filed.

February 7, 1969—Order filed granting Motion to Appoint Counsel, for appearance of counsel at oral argument and to file supplemental Brief.

February 10, 1969—Petitioner—Appellant's reply brief filed.

February 28, 1969—Oral argument heard and Order of Submission filed.

May 9, 1969—Opinion filed and Judgment entered reversing and remanding proceedings.

May 23, 1969—Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc filed.

June 11, 1969—Order Granting Appointment of Additional Counsel, George A. Cumming, Jr. filed.

June 18, 1969—Order Denying Petition for Rehearing filed.

United States District Court
Northern District of California

No. 48344

John Edward George,
Petitioner,
vs.
L. S. Nelson, Warden, San Quentin Prison,
Respondent.

RELEVANT DOCKET ENTRIES

December 7, 1967—Petition for writ of habeas corpus filed.

January 10, 1968—Order denying petition for writ of habeas corpus with leave to amend by naming the proper party respondent.

February 26, 1968—Amended Petition for writ of habeas corpus filed.

March 1, 1968—Order denying petition for writ of habeas corpus filed.

March 15, 1968—Petition for rehearing filed by petitioner.

March 21, 1968—Order denying petition for rehearing filed.

April 3, 1968—Application for certificate of probable cause filed.

April 25, 1968—Order granting petitioner's motion for certificate of probable cause and permiting petitioner to proceed *in forma pauperis.*

May 20, 1968—Notice of appeal filed.

In the United States District Court

Northern District of California

No. 48344

John Edward George, *Petitioner,*

vs.

State of North Carolina, *Respondent.*

ORDER

Petitioner, an inmate at San Quentin Prison, has filed this petition for writ of habeas corpus attacking his conviction by the State of North Carolina.

From the face of the petition it is apparent that the petitioner has failed to name the proper party respondent as required by 28 U.S.C. § 2242, for the person in whose custody he is confined is not designated. See *Mihailoviki v. State of California,* 364 F.2d 808 (9th Cir. 1966); *Morehead v. State of California,* 339 F.2d 170 (9th Cir. 1964).

Accordingly, this petition for writ of habeas corpus is DENIED, with leave to amend by naming the proper party respondent.

Dated: January 10, 1968.

/s/ Geo. B. Harris
United States
District Judge [CT 14]

United States District Court

Northern District of California

PETITION FOR WRIT OF HABEAS CORPUS
PERSONS IN STATE CUSTODY

Filed Feb 26 1968
James P. Welsh, Clerk

CASE NO. 48344

John Edward George (A-83856)
Full name and prison number (if any) of Petitioner

—VS—

L. S. Nelson, Warden, San Quentin State Prison (In the capacity as agent for State of North Carolina)
and
Warden, North Carolina State Prison
Name of Respondent (Name Unknown)

INSTRUCTIONS—READ CAREFULLY

In order for this petition to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall be set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

Since every petition for habeas corpus must be sworn to under oath any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should therefore exercise care to assure that all answers are true and correct.

If the petition is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that petitioner will be unable to pay the fees and costs of the habeas corpus proceedings. When the petition is completed, the *original and one copy* shall be mailed to the Clerk of the District Court for the Northern District of California, San Francisco, California.

[CT 15]

1. Place of detention: San Quentin State Prison
2. Name and location of Court which imposed sentence: Gaston County Superior Court, Gastonia, North Carolina
3. The indictment number or numbers (if known) upon which, and, the offense or offenses for which sentence was imposed:
   (a) 47614
   (b)
   (c)
4. The date upon which sentence was imposed and the terms of the sentence:
   (a) February 9, 1967 (12 to 15 years in North Carolina State Prison)
   (b)
   (c)
5. Check whether a finding of guilty was made:
   (a) after a plea of not guilty: XX
   (b) after a plea of nolo contendre:
   (c) after a plea of guilty:

6. If you were found guilty after a plea of not guilty, check whether that finding was made by:
   (a) a jury: XX
   (b) a judge without a jury:
7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes
8. If you answered "yes" to (7), list:
   (a) The name of each court to which you appealed:
      I Supreme Court of North Carolina
      II
      III [CT 16]
   (b) The result in each such court to which you appealed:
      I Judgment affirmed
      II
      III
   (c) The date of each such result:
      I September 27, 1967
      II
      III
   (d) If known, citations of any written opinion or orders entered pursuant to such results:
      I State v. George, #168 (156 S.E. 2d 845)
      II
      III
9. If you answered "no" to (7), state your reasons for not so appealing:
   (a)
   (b)
   (c)
10. State concisely the grounds on which you base your allegations that you are being held in custody unlawfully:

(a) Petitioner was released on July 11, 1966, from California custody to North Carolina authorities by mutual agreement (See 1389 Cal. Penal Code & (N.C.) G.S. 148-89) to stand trial for an alleged violation of North Carolina law. It is the North Carolina Supreme Court decision that is under attack here. North Carolina statute G.S. 148-89 and California Penal Code, Section 1389, Article III (a) says, in effect, that a person imprisoned in a party state (California and North Carolina are party states under this agreement) who has an untried indictment and for which a detainer has been lodged, **[CT 17]** *shall* be brought to trial within 180 days after written notice is received by the prosecuting officer of the jurisdiction lodging said detainer from the prisoner requesting final disposition of the indictment, unless for good cause the court may grant reasonable continuance. Petitioner's first trial ended in a mistrial on August 15, 1966. He was not brought to trial again until February 8, 1967, a period of 176 days from his first trial, 207 days from his arrival in North Carolina and 238 days from the time written notice was received by the North Carolina authorities.

(b) Petitioner was turned over to North Carolina pursuant to California Penal Code Section 1389 which provides a prisoner shall be tried within 120 days after his arrival in the demanding state (North Carolina). This statute was ignored by the prosecution thereby depriving petitioner his right to a speedy trial as guaranteed by statute and the United States Constitution.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Petitioner was scheduled for retrial on October 3, 1966, in Mecklenburg County. Because of adverse newspaper publicity of the first trial, petitioner moved for a change of venue which was granted. The second trial was to take place in Gaston County. Upon the granting of this motion (motion for retrial), for some still unexplained reason, petitioner was surrendered to the authorities of New Hanover County where he remained for some two (2) months without making a court appearance. In December, 1966 he was returned to Gaston County, but was told the courts recess for two (2) weeks during December, therefore his trial would have to commence after the holidays. In January he was told because of the courts recent recess he would be unable to immediately stand trial because of "congested calendar" occasioned by the December backlog of cases. On February 8, 1967, petitioner was finally taken to trial in Gaston County, over four (4) months after his scheduled retrial of October 3, 1966.

It should be noted that at this second trial, the prosecution presented two more witnesses than at the first trial—neither of these witnesses had petitioner seen before. It was because of these two "witnesses" testimony that has resulted in an innocent man being convicted of a crime he did not commit. Petitioner contends this unwarranted removal to New Hanover County was a prosecution scheme or plan to bolster a weak case with perjured testimony and the North Carolina Supreme Court has evaded and side stepped the issue by the ambiguous language in their opinion in *State v. George,* 156 S.E. 2d 845.

(b) In the opinion of *State v. George,* supra, the North Carolina court has asserted that petitioner was returned to North Carolina at his "own request", implying ~~that~~ this "request" **[CT 18]** nullifies the 120 day limit in which he legally must be brought to trial after arrival in North Carolina. This theory is not strictly true. A detainer was lodged with the California authorities by the North Carolina authorities stating he was "wanted" by the prosecuting attorney in North Carolina—not the reverse as the court seems to imply.

Petitioner knew that he had committed no crime in North Carolina. He wanted the detainer withdrawn so he could more favorably receive parole consideration from California and also enjoy the benefits of a reduced custodial status classification. Such classification is impossible to acquire with an unexecuted warrant lodged against a prisoner. In essence, petitioners initation of having the detainer executed was a *demand for trial.* Certainly petitioner was returned to North Carolina at the "request" of the prosecutor. Petitioner's written notice to attempt to clear up the detainer was mearly the catalyst to the North Carolina officials. There is no logical or reasonable manner in which it could be argued that this petitioner was tried in North Carolina at his "own request". However, even if this court does interpret this trial was at petitioner's "own request" as the North Carolina court ruled, it still does not change the wording of the statute. The North Carolina court is putting their own conditions on a statute that the legislature did not include. This court may take judicial notice that the North Carolina Supreme Court is not em-

powered with legislative functions or authority. They may interpret the law in their own manner, but they cannot change it as they have attempted to do in the instant case.

Petitioner contends both G.S. 148-89, Article III (a)—trial within 180 days after written notice received—and Article IV—trial within 120 days after arrival in North Carolina—apply here and the provisions contained therein have not been adhered to by the North Carolina authorities. **[CT 19]**

12. Prior to the petition have you filed with respect to this conviction:
   (a) Any petition in a State Court for relief from this conviction? Direct appeal to Supreme Court of North Carolina.
   (b) Any petitions in State or Federal Courts for habeas corpus? Yes—Previous petition filed in this court (#48344). Petition was denied with leave to amend—this is the amended petition. Order by Judge Harris 1/12/68.
   (c) Any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
   (d) Any other petitions, motions, or applications in this or any other court? Only as specified in (a) above.
13. If you answered "yes" to any part of (12), list with respect to each petition, motion, or application:
   (a) The specific nature thereof:
      I Direct appeal from judgment to Supreme Court, No. Carolina.
      II
      III
      IV

(b) The name and location of the court in which each was filed:

I. Supreme Court, North Carolina, 27th District

II

III

IV

(c) The disposition thereof:

I Judgment affirmed [CT 20]

II

III

IV

(d) The date of each such disposition:

I September 27, 1967

II

III

IV

(e) If known, citations of any written opinions or orders entered pursuant to each such disposition;

I *State v George,* 156 S.E. 2d 845

II

III

IV

14. Has any ground set forth in (10) been previously presented to this or any other court, State or Federal, in any petition, motion, or application which you have filed? Yes

15. If you answered "yes" to (14), identify:

(a) Which grounds have been previously presented?

I Violation of statutory guarantee to speedy trial as defined in G.S. 148-89, 1389 California Penal Code and Sixth Amendment to the United States Constitution.

II

III

IV [CT 21]

(b) The procedings in which each group was raised?

I On direct appeal

II

III

IV

16. If any ground set forth in said (10) has not previously been presented to any court, State or Federal, set forth the ground and state concisely the reasons why such ground has not been previously presented;

(a)

(b)

(c) [CT 22]

17. Were you represented by an attorney at any time during the course of:

(a) Your Arraignment and Plea? Yes

(b) Your Trial, if any? Yes

(c) Your Sentencing? Yes

(d) Your Appeal, if any, from the judgment of conviction of the imposition of sentence? Yes

(e) Preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes to one or more of (17), list:

(a) The name and address of each attorney who represented you:

I T. O. Stennett, Attorney At Law (At all proceedings)

II Suite 520, Wilder Building
Charlotte, North Carolina

III

(b) The proceedings at which such attorney represented you:

I Arraignment and plea

II Trial and sentencing

III Appeal

19. If you are seeking leave to proceed in *forma pauperis*, have you completed the sworn affidavit setting forth the required information (see, Instructions, page 1, of this form)?

N/A

State of California } ss: Verification
County of Marin }

I, John Edward George, being first sworn under oath, presents that he has subscribed to the above and does state that the information therein is true and correct to the best of his knowledge and belief.

Dated: February 14, 1968

Respectfully submitted,

By: /s/ JOHN EDWARD GEORGE
Signature of Petitioner **[CT 23]**

MEMORANDUM OF POINTS AND AUTHORITIES AND ARGUMENT IN SUPPORT OF PETITION

Jurisdiction of this court is invoked under 28 USCA 2254 after petitioner has sought relief in the Supreme Court of North Carolina in an action entitled *State v. George*, 156 S.E. 2d 845. As this was a direct appeal to the state's highest court, there is no statutory provisions for petitioner to seek further relief in a state proceeding. Hence, since petitioner

has exhausted his state remedies, this court has jurisdiction to issue an order to Show Cause why the writ of habeas corpus should not issue as prayed under *Fay v. Noia,* 83 S. Ct. (1963), as petitioner has litigated his federal claim in the state courts at least once, persuant to available state remedies before being eligible to apply for the writ in a federal district court. (See *Fay v. Noia,* Supra)

This was a criminal action tried at the Regular Session of the January 30, 1967, Criminal Term of the Superior Court of Gaston County, before his Honor W. K. McLean, Judge Presiding and a jury. Said criminal case having been transferred for trial from Mecklenburg County to Gaston County under "Order For A Change Of Venue," dated October 4, 1966.

The petitioner was serving a sentence in the California State Prison. The bill of indictment # 47-614 was procured by the State of North Carolina, Mecklenburg County, charging the petitioner with Armed Robbery, and as a result of said bill a detainer was lodged against petitioner with the State of California. **[CT 24]** Petitioner was notified by the California Prison Authority that he would be eligible for parole in October, 1966, if said detainer was cleared. Petitioner made request to the proper authorities on June 15, 1966 that he be returned to North Carolina for trial. That under the Interstate Agreement on detainers he was returned to North Carolina, arriving in the State of North Carolina on the 11th day of July, 1966; petitioner was put to trial on the 15th day of August, 1966, with said trial resulting in a mistrial. Petitioner was again put to trial over his protest on February 7, 1967.

Before entering a plea, petitioner moved the court to declare the indictment null and void and of no effect, on the grounds that he had not been brought to trial in the statu-

tory time limit; and petitioner also moved the court to stay the trial for the lack of jurisdiction. On the denial of these motions the petitioner, upon being placed on trial for Armed Robbery (211 PC), entered a plea of Not Guilty, and from a verdict of guilty and a judgment pronounced thereon, the petitioner appealed to the North Carolina Supreme Court. Said appeal was affirmed by the North Carolina Supreme Court and petitioner hereby petitions the Federal Court on the questions that the North Carolina State Court dismissed.

Petitioner's motion moving the court for an order declaring the bill of indictment void and no further force and effect should have been allowed on the grounds that petitioner was not brought to trial within the statutory time. Also, petitioner's motion as to the lack of jurisdiction of the court to try the case should have been allowed.

The question raised by petitioner's first motion is based on **[CT 25]** the time element, wherein petitioner contends the state failed to comply with the statutory requirements set out under GS 148-89, Article III(a); and GS 148-89, Article IV(c).

The question raised by petitioner's second motion is the Court's lack of jurisdiction, GS 148-89, Article III(d) and GS 148-89, Article IV(c).

General Statutes 148-89(a), to wit:

"prisoner shall be brought to trial within One Hundred Eighty (180) Days after he shall have cause to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment; provided that for good cause shown in open court the prisoner and his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

General Statutes 148-89, Article IV(c), to wit:

"In respect of any proceedings made possible by this article, Trial Shall be Commenced Within One Hundred Twenty (120) Days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

Addressing petitioner's remarks to the question raised in the first motion, petitioner contends that he complied with the statutory requirements in that:

(a) "Letter dated June 15, 1966 from John Edward George to the Hon. Edward Brown, Governor of California, marked defendant's Exhibit # 4 for identification" is evidence of defendant's (petitioner's) compliance with portion of GS 148-49, Article III(b); **[CT 26]** requiring notice to be returned to the State of North Carolina to stand trial on indictment which a detainer had been lodged against petitioner;

(b) the record reveals that petitioner had entered upon an indeterminate term of from five (5) years to life in a penal institution, to wit: California State Prison at San Quentin; that said sentence had been running from April 28, 1964; parole eligibility October, 1966.

As per notice of June 15, 1966, petitioner was brought into the State of North Carolina on July 16th, 1966, and put to trial in Mecklenburg County on August 15th, 1966, said trial resulting in a mistrial. Again on October 3, 1966, the State commenced the second trial, at which time the petitioner made a motion for a change of venue, which motion was ordered by Order dated October 4, 1966, transferring said cause to the Superior Court of Gaston County for trial. When petitioner was finally brought to trial in Gaston County on February 8, 1967, after having been routed via

New Hanover County for a period of several months, petitioner made a motion asking the court to declare the indictment null and void, and of no further effect, and to dismiss the same, said motion was denied. Petitioner was put to trial on February 8, 1967. When petitioner was called to trial a motion was lodged with the Court attacking the jurisdiction of the Court.

Petitioner submits that between August 15th, 1966 until October 3rd, 1966, there was a time lapse of Forty-Eight Days he was required to remain in jail without just cause, and the State made no effort to bring petitioner to trial during the several criminal terms between these dates, and there was no **[CT 27]** reason for not bringing petitioner to trial except the negligence on the part of the State, as petitioner was at all times ready for trial.

Petitioner contends and so submits that his Constitutional right as to a speedy trial was violated; Constitution of the United States, Article VII, Amend. VI.

Petitioner submits that when he was called to trial on *October 3, 1966* and motion for change of venue granted, he was spirited away on *October 4, 1966;* having been transported to Wilmington, North Carolina, under a writ of Habeas Corpus ad Prosequendum, issued on the 4th day of October, 1966, by the Honorable Henry L. Stevens Jr., Superior Court Judge of North Carolina, at the request of the prosecuting attorney of Mecklenburg County. That petitioner was lodged in the New Hanover County Jail, Wilmington, North Carolina, on the 4th day of October, 1966, and remained in said jail until December 7, 1966, when a motion was made on behalf of petitioner by petitioner's attorney to be returned for trial in Gaston County, and the motion granted by the Honorable George M. Fountain, Judge of the Superior Court of North Carolina.

The time that expired between October 4th, 1966, and December 7, 1966 was a sum total of Sixty-Five (65) days. As there had been no detainer lodged against petitioner, or any untried indictments, information or complaint pending in New Hanover County, therefore, State was not in compliance with GS 148-89, Article IV(a) to wit:

"The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be **[CT 28]** entitled to have a prisoner Against Whom He Has Lodged a Detainer and who is serving a term of imprisonment in any party state made available in accordance with GS 148-89, Article V(a)."

This delay of Sixty-Five Days was caused by the state's error and cannot be contributed to any fault of petitioner as he was ready for trial on the indictment in Mecklenburg County, the indictment he agreed and requested to be returned to trial for. This was an action by the State over which petitioner had no control, and therefore would negative any argument by the State as to "good cause shown for necessary or reasonable continuance."

Petitioner submits that inasmuch as there was no detainer filed in the State of California by the State of North Carolina with respect to untried indictments in New Hanover County at the time petitioner agreed to return to North Carolina as required by North Carolina General Statutes, 148-89, the petitioner did not waive his right to extradition proceedings in the State of California with respect to any indictments, against him inNew Hanover County, North Carolina.

Petitioner contends that he was held illegally, and without due process of law in New Hanover County for a period of Sixty-Five (65) Days in violation of the Federal Constitution, and delayed unnecessarily the trial on the Mecklenburg

indictment, and was informed and believes that the state of North Carolina through its solicitor and others, planned to keep petitioner confined, imprisoned and restrained in New Hanover County Jail until such time as he would make a confession or agree to be put to trial in New Hanover County, and that the only thing that prevented the State from so doing was a motion on behalf of petitioner by his attorney, and granted by the Honorable George M. Fountain, Judge of the Superior Court of North Carolina, for his release or transfer back for trial in Mecklenburg County, all of which petitioner contends shows bad faith. Petitioner further contends the transfer of his person from Mecklenburg County to the County Jail in New Hanover County was for the purpose of forcing him to stand trial on the subject charges and was [CT 29] in derogation of the Interstate Contract and Agreement on Detainers to which the state of North Carolina was a party and in direct violation of Article 10, Chapter 148 of North Carolina General Statutes, entitled "Interstate Agreement on Detainers". Therefore petitioner contends that the State has no right to evade the responsibility of the unnecessary and unreasonable delay caused by their sole actions, and that such unjust delay caused petitioner to be confined in jail without affording him the trial he came to North Carolina to have. That such action was very prejudicial to the petitioner and should be awarded for the unjust treatment at the hands of the State by having the indictment dismissed in accord with their own State Statute, GS 148-89.

From October 3rd, 1966 when petitioner was called to trial until February 8th, 1967 when petitioner was finally put to trial a sum total of One Hundred Twenty Eight (128) Days expired. So petitioner contends that if the State should try to contend for "good cause shown" on account of

petitioner's motion for a change of venue, that this argument would be negative by the elapse of One Hundred and Twenty Eight (128) Days, far more than the requirements.

Petitioner contends that the continuance of February 3rd, 1967 by trial court should not be allowed to stand in view of the negligence of the State as shown in the hereinabove state of facts, and the petitioner should not have been put to trial after the statutory time had been allowed to run. **[CT 30]**

Petitioner contends that the time governing the statutory time should be computed from June 15th, 1966 the time he made request to be brought back for trial, until he was put to trial on February 8th, 1967, a sum total of Two Hundred and Thirty Nine (239) Days, far beyond the One Hundred and Eighty (180) Days. GS 148-89, Article III(a); or at least petitioner contends that the time should be computed from the time of his arrival in the State of North Carolina, on the 16th day of July, 1966 until he was put to trial on February 8th, 1967, a sum total of Two Hundred and Eight (208) Days, far beyond the statutory limits of One Hundred and Eighty (180) Days.

Petitioner further contends that at least the statutory time should be computed from the time of his request on October 3rd, 1966 for a change of venue until the time he was put to trial on February 8th, 1967, which would be a time total of One Hundred and Twenty Eight (128) Days, which would exceed the statutory time of One Hundred and Twenty (120) Days. GS 148-89, Article IV(c).

Petitioner contends the first motion should have been allowed as the statutory time had run against the state and in favor of the petitioner. GS 148-89, Article III(a), or that the second motion should have been allowed as the Court had no jurisdiction of the subject matter, the statutory time being the governing factor. **[CT 31]**

This case is similiar in many respects to *Klopfer v. State of North Carolina,* No. 100, October Term, 1966, decided March 13, 1967. In *Klopfer v. State of North Carolina,* Mr. Chief Justice Warren held North Carolina's statute procedural device known as the "nolle prosequi with leave" was in violation of the Federal Constitutional guarantee of the right to a speedy trial. *Klopfer* was before the High Court at approximately the same time petitioner was awaiting trial on the cause presented herein. It is petitioner's considered opinion that because of the impending decision due in *Klopfer,* the North Carolina Solicitor circumvented the "nolle prosequi" practice and arranged to have petitioner delivered to yet another jurisdiction—New Hanover County—pursuant to a writ of habeas corpus as prosequendum on an apparently non existent charge as your petitioner was never taken to court in New Hanover County. He merely sat in jail for some sixty five (65) days in a strange county for no reason—except to give the prosecutor the added time advantage to prepare a "new" case against the defendant. The prosecution knew petitioner was on loan from California and could not make bail. The extra delay caused by the North Carolina authorities provided an over zealous prosecutor the opportunity to produce two (2)—evidently professional—witnesses which by their completely false and perjurious testimony, unsupported by any documentary proof whatever, tipped the scales to the prosecution's advantage and resulted in the conviction complained of herein.

The tactics complained of in this petition, tactics by the North Carolina solicitor, have denied petitioner the Fourteenth Amendment's guarantee to due process of law and a speedy trial. (*Mally v. Hogan,* 378 U.S. @ 10; of: *Pointer v. Texas,* 380 U.S. 400 on illegal "mug shots" Identification)

The North Carolina Court has ignored their own legislation on this issue (G.S. 148-89, Article III(a), Article IV) and apparently shifting the responsibility to the more qualified Federal Court on this Federal issue. The decision was a **[CT 32]** close 4 to 3 majority in this case (*State v. George,* supra). Petitioner feels this court should order a hearing to determine the question presented by this application and respectfully requests the appointment of counsel under *Gideon v. Wainwright,* 372 U.S. 355, to adequately present his cause before this court.

This amended petition is submitted pursuant to the order by Chief Judge George B. Harris denying the previous application (# 48344) with leave to amend, presented in this matter by incorrectly naming the respondent.

Although this action concerns the State of North Carolina, the actual person having petitioner in custody is L.S. Nelson, Warden, San Quentin Prison, who is acting as agent for North Carolina in this instance.

Respectfully,

/s/ John Edward George
John Edward George
Petitioner

Dated: February 14, 1968 **[CT 33]**

In the United States District Court
Northern District of California

No. 48344

Filed Mar. 1, 1968
James P. Welsh, Clerk

John Edward George,
Petitioner,

vs.

L. S. Nelson, Warden, San Quentin Prison,
Respondent.

ORDER

By order of this Court dated January 10, 1968, petitioner's application for writ of habeas corpus was denied for failure to name the proper party respondent. This deficiency has now been corrected.

Petitioner, while imprisoned at San Quentin Prison pursuant to a valid California judgment, was transferred to North Carolina to stand trial on a charge of armed robbery. He was convicted and returned to San Quentin. He now seeks to attack his North Carolina conviction.

\lthough his petition does not so state, it is assumed that the petitioner is serving concurrent sentences on the California and North Carolina convictions. Thus, he would not be entitled to release from detention, even if his North Carolina conviction were held to be illegal. This **[CT 38]** is a fatal defect. *McNally v. Hill,* 293 U.S. 131.

Accordingly, this petition for writ of habeas corpus must be, and hereby is, DENIED.

DATED: March 1, 1968.

/s/ Geo. B. Harris
United States District Judge **[CT 39]**

John Edward George
Box A 83856
Tamal, California 94964

In pro se

In the United States District Court
for the Northern District of California

No. 48344

Filed Mar. 15, 1968
James P. Welsh, Clerk

John Edward George,
Petitioner,
vs.
L. S. Nelson, Warden, San Quentin Prison,
Respondent.

PETITION FOR REHEARING

To: The Honorable George B. Harris, Presiding

By an order of this court filed on March 1, 1968, and received by petitioner on March 7, 1968, it was declared petitioner's amended application for habeas corpus was denied.

The reason for said denial was this court's application of *McNally v. Hill,* 293 U.S. 131 to the case at bar.

Petitioner herein respectfully requests the court to reconsider the previously submitted petition in this matter and bases his request on the following issues:

In petitioner's previous petition, the manner of service of his North Carolina sentence was left unexplained. This was

because the sentencing court in North Carolina did not specify how its sentence should be served. The sentencing court imposed a twelve to fifteen year sentence. Actual service or commencement of this term will not start until petitioner is delivered to, and is in actual custody of the warden of the **[CT 40]** North Carolina Prison. Although it was not expressly so ordered, the effect of the North Carolina sentence is consecutive, not concurrent.

The court has denied issuance of this writ on the 1934 ruling of *McNally v. Hill,* supra, however, this was done on the obvious assumption that the North Carolina and California sentences were being served concurrently. Under the circumstances, petitioner respectfully suggests his cause does not fall under the strict rule of *McNally* but falls into the more realistic and contemporary ruling in *Arketa v. Wilson,* 373 F. 2d 582 (9th Cir. 1967). *Arketa* held that the writ could issue regardless of *McNally* if ". . . it appears that there are situations in which the writ can be used to free a petitioner *from a certain type of custody, rather from all custody.*" (Emphasis Added) cf. *Martin v. Virginia,* (1965) 349 F. 2d 781; *Smart v. Wilson,* #43221 U.S.D.C.—San Francisco.

Petitioner respectfully points out that the granting of this writ would free him from a particular type of custody—the unexecuted North Carolina warrant. This is a form of custody as it assuredly affects his custodial classification and probability of parole on his California sentence. A similar ruling on a specific type of custody was pronounced in *Jones v. Cunningham,* (1963) 371 U.S. 236, that dealt with a convict on parole. The Supreme Court held parole was a type of custody as it curtailed freedom of movement. As

applied here, the North Carolina detainer likewise reduces petitioner's freedom of movement and under *Jones* must be considered a certain type of custody. Petitioner is *not* contesting his conviction, per se, he is attacking his unlawful custody caused by the North Carolina detainer which has resulted from an unlawful conviction. Federal habeas corpus is to contest illegal custody, that is the issue petitioner is attempting to present before **[CT 41]** this court.

Petitioner is of the opinion his situation falls within the meaning of the *Arketa* ruling and rationale. Therefore, in light of the foregoing petitioner respectfully requests this court to reapprise its prior denial of the writ in this matter —this denial based entirely on *McNally v. Hill,* and most urgently moves this court to rule and base its decision in this matter on the merits of the case as set forth in detail in the prior application that this petition for a re-hearing is based upon.

Respectfully submitted,

/s/ John Edward George,
John Edward George
Petitioner

Dated: March 8, 1968 **[CT 42]**

In the United States District Court
Northern District of California

Filed Mar. 21, 1968.
James P. Welsh, Clerk

No. 48344

John Edward George, *Petitioner,*

vs.

L. S. Nelson, Warden, San Quentin Prison, *Respondent.*

ORDER

By order of this Court dated March 1, 1968, petitioner's application for writ of habeas corpus was denied. The Court, relying on *McNally v. Hill,* 239 U. S. 131, held that inquiry into the petitioner's North Carolina conviction was barred because he was concurrently serving a sentence pursuant to a valid California judgment.

Petitioner now seeks a rehearing. He argues that *McNally* is not applicable to his case because he will not begin serving his North Carolina sentence until completion of his California sentence. The *McNally* rule, however, is equally applicable to the situation where the sentence imposed pursuant to the conviction under attack is to be served after, rather than concurrently, with the valid sentence.

Accordingly, this motion for a rehearing must be, **[CT 43]** and hereby is, denied.

Dated: March 20, 1968.

/s/ Geo. B. Harris
United States District Judge **[CT 44]**

No. 22851

In the United States Court of Appeals
for the Ninth Circuit

John Edward George,
Petitioner and Appellant,
vs.
The State of North Carolina,
Respondent and Appellee.

EXHIBITS A THROUGH D ATTACHED TO OPPOSITION TO MOTION TO REMAND TO DISTRICT COURT AND MOTION TO DISMISS APPEAL FILED BY APPELLEE NELSON ON JULY 1, 1968

THE ANNEXED INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE. ATTEST: CERTIFIED

APR 27 1964

MARTIN MONGAN, COUNTY CLERK OF SAN FRANCISCO, AND EX-OFFICIO CLERK OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO.

BY ..... DEPUTY

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APR 27 1964
MARTIN MONGAN, Clerk
By J. FITZPATRICK
Deputy Clerk

Six GUID62815CENTER

DEPT. No..... CASE No.....

In the Superior Court of the State of California

IN AND FOR THE City & COUNTY OF San Francisco

ABSTRACT OF JUDGMENT

(Commitment to State Prison as provided by Penal Code Section 1213.5)

The People of the State of California,

vs

JOHN EDWARD GEORGE

Defendant.

Hon. Francis McCarty (Judge of Superior Court)

John M. Dean (District Attorney)

Cyril L. Weeks (Counsel for Defendant)

This certifies that on the 27th day of April, 19 64 judgment of conviction of the above-named defendant was entered as follows:

In Case No. 62815 Count No. 2 he was convicted by Court (Court or Jury); on his plea of Guilty (guilty, not guilty, former conviction or acquital, once in jeopardy, not guilty by reason of insanity); of the crime of Robbery in the First Degree

(designation of crime and degree, if any, including the fact that it constitutes a second or subsequent conviction of same offense if that affects the sentence and if under Section 209 of the Penal Code whether victim suffered bodily harm)

in violation of 211 Penal Code (reference to Code or Statute, including Section and Sub-Section);

with prior convictions charged and proved or admitted as follows:

DATE	COUNTY AND STATE	CRIME	DISPOSITION

Defendant was (was) or (was not) charged and admitted the allegations of this count to have been armed with a deadly weapon at the time of commission of the offense, or a concealed deadly weapon at the time of his arrest within the meaning of Penal Code Sections 969c and 3024.

Ct. No. 3 Deadly Weapon cause dismissed

EXHIBIT A

30

Defendant was not (was) or (was not) adjudged a habitual criminal within the meaning of Sub-division ..... (a) or (b) of Section 644 of the Penal Code, and the defendant ..... (is) or (is not) a habitual criminal in accordance with Sub-division (c) of that Section.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said defendant be punished by imprisonment in the State Prison of the State of California for the term provided by law, and that he be remanded to the Sheriff of the City & County of San Francisco and by him delivered to the Director of Corrections of the State of California at the place hereinafter designated.

It is ordered that sentences shall be served in respect to one another as follows: ..... (Note whether concurrent or consecutive as to each count)

and in respect to any prior incompleted sentence (s) as follows: ..... (NOTE whether concurrent or consecutive as to all incomplete sentences from other jurisdictions);

To the Sheriff of the City & County of San Francisco and to the Director of Corrections:

Pursuant to the aforesaid judgment, this is to command you, the said Sheriff, to deliver the above-named defendant into the custody of the Director of Corrections at Vacaville, California at your earliest convenience.

Witness my hand and seal of said court

this 27th day of April 27, 1964

MARTIN MONGAN ..... Clerk

by ..... Deputy

SEAL

State of California,

City & County of San Francisco

I do hereby certify the foregoing to be a true and correct abstract of the judgment duly made and entered on the minutes of the Superior Court in the above entitled action as provided by Penal Code Section 1213.

attest my hand and seal of the said Superior Court this 27th day of April 19 64

MARTIN MONGAN, by J. FITZPATRICK Deputy

County Clerk and Ex-Officio Clerk of the Superior Court of California in and for the City & County of San Francisco

The Honorable: Francis McCarty

Judge of the Superior Court of the State of California, in and for the City & County of San Francisco

NOTE: If probation was granted in any sentence of which abstract of judgment is certified, attach a minute order reciting the fact and imposing sentence or ordering a suspended sentence into effect.

Entered in Min. Dept. 6, Sup. Ct., vol. 208

	Credits Forfeited	Restored Credits	Additional Credits	Discharge Date	Effective Parole Date
CRIME: Robb 1st (211) PC					
TERM: 5-Life					
COUNTY: SAN FRANCISCO					
County Case No.: 62815 PG					
JUDGE: F. MC CARTY					
4-28-64 REC'D @ RGC CMF					
6-4-64 Wanted-Marshal, Sedgwick Co., Wichita, Kansas (Armed Robb) #64 CR 49					
6-10-64 Wanted Washoe Co. D.D. Nevada Warr# 63-163					
6-11-64 Wanted Charlotte P.D. No. Carolina Warr# 40992					
7-23-64 Rec'd CR					
10-14-65 Denied. Placed on NR Calendar -					
7-20-66 Released to Custody, State of North Carolina (Under the Provision of the Interstate Agreement on Detainers.)					
10-25-66 LP until return from North Carolina.					
3-12-67 Rec'd S.J. T.T. (fr. No Carolina)					
4-21-67 Wanted-State of No. Carolina					
7-20-66 No longer Wanted (North Carolina - Police Dept. (Charlotte)					
4-26-67 Denied. LP on NR Cal.					
4-25-68 Denied. LP on NM Cal.					

A-83856 GEORGE, JOHN EDWARD
Summary of Sentence Data

CDC-118 (23883)

EXHIBIT B

Wanted

Exhibit C

State of North Carolina
Prison Department [Letterhead]
Raleigh 27603

January 31, 1967

Warden Lawrence E. Wilson
California State Prison
San Quentin, California 94964

Attention: W. C. Schiller

Re: George, John E.
A-83856

Dear Mr. Schiller:

In reply to your letter of January 20, 1967, about subject, I find the following:

When he was tried in Wilmington, North Carolina, (New Hanover County), the judge allowed his motion not to be tried because the detainer had not been filed prior to his being brought to this State. He was then turned back to the Mecklenburg County authorities. He objected to trial there because of the publicity at the first trial which ended in a mistrial. He was then sent to Gaston County for a change of venue. He will be tried during the week of February 6, 1967, and should be on his way to California shortly thereafter. If he is not returned by March 1, 1967, please let me know.

Sincerely,

/s/ Martin R. Peterson
Martin R. Peterson
Prisoner Rehabilitation Director

MRP/jg

Exhibit D

GASTON COUNTY [Letterhead]
Office of
Clerk of the Superior Court
Gastonia, North Carolina
April 14, 1967

Mr. W. C. Schiller, Records Officer
California State Prison
San Quentin, California

Dear Mr. Schiller:

Transmitted herewith is a certified copy of the Judgment of the Superior Court of Gaston County, North Carolina, rendered in the case of State vs John Edward George, also known as Johnny George, your number A-83856.

We are advised that this man is serving a sentence of imprisonment at California State Prison.

This is, therefore, to advise you that he is wanted at the termination of his imprisonment there for return to this jurisdiction to serve the sentence imposed in the Superior Court of Gaston County, North Carolina.

I ask that you acknowledge receipt of this letter and that you inform me if other or further records or documentation is required.

We desire to be notified in advance of any release date in the future in order that custody can be assumed by North Carolina authorities.

Very truly yours,

/s/ GEORGE C. HOLLAND
George C. Holland
Clerk of Superior Court

State of North Carolina

County of Gaston

In the Superior Court, January 30, 1967
Criminal Session

State

vs.

John Edward George

Charge: Armed Robbery.
Plea: Not Guilty.
Jury Verdict: Guilty as charged in the Bill of Indictment.

JUDGMENT

It is the judgment of the Court that the defendant be confined in the State's Prison, there to be assigned to labor under the supervision of the State Prison Department for a period of not less than twelve (12) nor more than fifteen (15) years.

It is recommended that the cases pending in New Hanover County be dismissed.

W. K. McLean
Judge Presiding

NORTH CAROLINA, GASTON COUNTY.

CERTIFICATE

I hereby certify the foregoing and/or annexed to be a true and correct copy of the original document indicated as appears from the caption thereof, as the same is taken from and compared with the said original document now on file and as appears of record in the office of the Clerk of Superior Court of Gaston County at Gastonia, North Carolina.

Witness my hand and official seal, this the 14th day of April, 1967.

/s/ George C. Holland
GEORGE C. HOLLAND
Clerk of Superior Court, Gaston County, North Carolina

No. 22851

In the United States Court of Appeals

For the Ninth Circuit

John Edward George,
Petitioner and Appellant,

vs.

The State of North Carolina,
Respondent and Appellee.

EXHIBIT "A" ATTACHED TO ANSWERING BRIEF FILED BY APPELLEE NELSON ON SEPTEMBER 6, 1968

Exhibit A

Policy Statement #21
Adopted: November 27, 1967

ADULT AUTHORITY POLICY STATEMENT PRISONER TRANSFERS TO CONCURRENT JURISDICTION

The following policy is broad in its scope and is prepared as a guide to Adult Authority panels when making case decisions concerning California prisoners being transferred to another State or Federal jurisdiction to serve a concurrent sentence there imposed upon them or to face criminal charges outstanding and from which may emanate a concurrent sentence. This policy is in harmony with courses of action provided for by the Agreement on Detainers (Section 1389 P.C.), the Western Interstate Corrections Compact (Section 11190 P.C.), and related statutory provisions (i.e., Section 2900 P.C.), Executive

Agreement Cases (Section 1548 and 1549 P.C.), and court law (In re Stoliker 49 Cal. 2d 75, and In re McClure 192 Cal. App. 2d 38) which renders transfer of such prisoners an administrative function.

In any such case it is Adult Authority policy that a Summary Report prepared by the Department of Corrections, and in which compliance or non-compliance with Section 5077 P.C. is certified, shall be considered as a Special Proceedings Calendar matter prior to the transfer. In cases where the prisoner previously has been interviewed by an Adult Authority Member regarding any commitment for which the sentence remains undetermined, a special action as appropriate to fix his sentence or to place him on calendar pursuant to Adult Authority Resolution No. 266 will be taken. If Section 5077 P.C. has not been complied with the prisoner will be scheduled for a personal appearance before an Adult Authority Member on the first available institution calendar. In any event, Adult Authority panel decisions will be made on an individual basis with all of the relevant facts of each case before them and will be guided by the following:

A. Fix or Refix California Term(s) to Discharge (NFPC) in favor of full jurisdiction of the other agency where a concurrent sentence is to be served;

   1. When the clinical profile is not one of high violence, and the prisoner is not a California resident, and a lengthy sentence already imposed in the other jurisdiction is adequate to provide for effective control and treatment.

   2. When California sentence is for non-violent behavior and incarceration for a concurrent sentence is to be in prisoner's home state or closely adjacent thereto.

3. When commitment offenses were non-violent, both in California and the other jurisdiction, and all parties will best be served by final disposition of term-fixing and releasing functions being assumed by the corresponding agency in the other jurisdiction.

4. When California commitment is for non-violent behavior, or is near its maximum expiration, and release to the full jurisdiction of another state on tried or untried charges will facilitate institutional and/or release programming by that jurisdiction.

B. Fix or Refix California Term(s) and Grant Parole, "To Go to Hold," to provide for concurrent institutional programming and cooperative arrangements with corresponding agencies in the other jurisdiction as they carry out their term fixing and releasing functions;

1. When California minimums have not been served, but rehabilitative progress is sufficient to support favorable prognostications.

2. When concurrent sentence to be served in the other jurisdiction is too short to provide for post-release parole supervision which the Adult Authority considers necessary for the welfare of the prisoner and of society.

3. When the California prisoner is to face an untried charge in a jurisdiction in or near his home state and case review indicates readiness for release to parole supervision irrespective of the outcome of the charge pending in the party state.

C. "Temporary Release from California Imprisonment Noted; Place on (a designated) Calendar" for further review;

1. When a California prisoner is transferred to a party state to face an untried indictment or warrant which may result in an additional prison sentence there, and the outcome of those proceedings may materially influence the Adult Authority's term-fixing decision.
2. When a California prisoner is transferred to another jurisdiction to serve a concurrent sentence already imposed, and evidence of continued rehabilitative progress while doing so may justify a decision to fix or refix the California term(s) to discharge or grant parole to cooperative supervision in another state—especially if the prisoner will be confined in or near his home state.
3. Where the California commitment offense was extremely serious and correctional treatment—controls beyond the statutory limits of a concurrent sentence in another jurisdiction are considered necessary—especially if prisoner is a California resident.

When any California prisoner has been transferred to another State or Federal jurisdiction to serve a concurrent sentence or to face criminal charges prior to Section 5077 P.C. having been complied with, it is Adult Authority policy that his case shall be prepared for scheduled presentation and review by an Adult Authority panel pursuant to Adult Authority Resolutions No. 184 and 266. Inabsentia actions will be taken as appropriate pending the prisoner's return to California imprisonment and compliance with Section

5077 P.C. A California detainer will be placed to effect return to custody of the Director of Corrections upon expiration of the sentence in the other jurisdiction.

Pursuant to Section 2081.5 P.C., case responsibility for preparation and presentation of scheduled progress reports to the Adult Authority regarding all prisoners transferred to concurrent jurisdiction shall be that of the Department of Corrections institution or division which is custodian of the complete case records during each prisoner's temporary absence from the custody of the Director of Corrections.

March 4, 1969

John Edward George v. State
of North Carolina
No. 22851

Clerk of the 9th Circuit
Court of Appeals
Ninth and Mission Streets
San Francisco, California 94118

Dear Sir:

During oral argument on the above-entitled action on February 28, 1969, the court granted me leave to consider whether I should stipulate to the admission into the record of additional documentation which the Deputy Attorney General sought at that time to introduce.

I have examined the material and discussed with the Deputy Attorney General the reasons for seeking its admission. I do not feel that the additional material has any relevance to the issues presently before this court and my discussions with opposing counsel have not persuaded me to the contrary. Accordingly, I must decline to stipulate to the admission to the record of this material at this late stage of the proceedings.

Yours very truly,

David B. Frohnmayer

cc: Mrs. Louise Renne
Deputy Attorney General

Office of the Attorney General, Department of Justice

[Letterhead]

State Building, San Francisco 94102

March 5, 1969

Hon. William B. Luck, Clerk
United States Court of Appeals
for the Ninth Circuit
P. O. Box 547
San Francisco, California 94101

Dear Mr. Luck:

Re: John Edward George v. State of North Carolina, No. 22851

During oral argument of the above-entitled matter on February 28, 1969, I moved that certain materials be filed with the Court to supplement and clarify the record already on file in this case. Those materials were as follows:

a. A Certification from the Records Officer of the California State Prison at San Quentin to the effect that the state of Kansas and Nevada placed detainers against the petitioner at a time prior to the detainer placed by North Carolina;

b. A letter recently received by the prison officials from the Office of the District Attorney at Reno, Nevada, stating that it is the intention of that office to exercise the "hold" against petitioner;

c. A letter from the Office of the District Attorney at Wichita, Kansas, to the same effect;

d. Correspondence between the Records Officer at San Quentin Prison and the Clerk of the Superior Court in Gastonia, North Carolina, with respect to the North Carolina detainer;

e. A copy of the Criminal Complaint upon which the Nevada detainer is based; and

f. The Warrant of Arrest upon which the Kansas detainer is based.

It was our view that these materials were relevant and particularly explained the Summary of Sentencing Data attached as Exhibit "B" to our "Opposition to 'Motion to Remand to District Court' and Motion to Dismiss Appeal."

We are in receipt of the letter of March 4, 1969 by counsel for the petitioner informing the Court that he declines to stipulate to the admission to the record of this material at this time. While the Court indicated at oral argument that a stipulation was necessary before these records would be filed, we believe that they should, in any event, be lodged with the Court in order that the Court have some idea of the matters upon which my motion was made.

An original and three copies of each document is enclosed.

Very truly yours,

THOMAS C. LYNCH
Attorney General

LOUISE H. RENNE (MRS.)
Deputy Attorney General

LHR:sq
Enclosure

cc: David B. Frohnmayer
Attorney for Petitioner

Department of Corrections
California State Prison [Letterhead]
San Quentin, California 94964

CERTIFICATION

Re: John Edward George
A-83856

I, Robert T. Powers, Records Officer of the California State Prison at San Quentin, an institution of the Department of Corrections do hereby certify that I am the custodian of the records and I am authorized to certify to such records.

I further certify that I have in my custody the records of John Edward George, A-83856, and these records show that subject has three detainers placed against him by out-of-state agencies: Warrant placed with the Department of Corrections on June 4, 1964 by the Marshal, Sedgwick County, Wichita, Kansas; Complaint placed with the Department of Corrections on June 10, 1964 by the Washoe County Police Department, State of Nevada; Warrant placed with the Department of Corrections on June 11, 1964 by the Police Department, Charlotte, North Carolina.

When a parole release date is granted by our Adult Authority, in cases where two or more detainers have been placed, it is our policy to notify the agency first placing a detainer of subject's availability to their custody. In the event that agency does not wish to exercise their detainer, the second agency will be notified, (according to chronological order), of subject's availability to their custody.

I certify under penalty of perjury that the foregoing is a true and correct statement to the best of my knowledge.

Done at San Quentin, California this 26th day of February 1969.

/s/ R. Powers
ROBERT T. POWERS
Records Officer

CALIFORNIA STATE PRISON AT SAN QUENTIN
RTP :lr

Office of the
DISTRICT ATTORNEY
County of Washoe [Letterhead]
Court House
Reno, Nevada 89501

February 14, 1968

Project Inside-Out, Inc.
328-30th Avenue
San Francisco, California 94121

Attention: C. Winthrop Forbush, Jr.

Gentlemen:

Re: John E. George

In reply to your letter of January 22, 1968, it is the intention of this office to exercise the hold against John E. George and return him to Nevada for trial when he is released from San Quentin, California.

Very truly yours,

WILLIAM J. RAGGIO
District Attorney

/s/ Herbert F. Ahlswede
HERBERT F. AHLSWEDE
Chief Criminal Deputy

HFA/vaw

OFFICE OF THE COUNTY ATTORNEY

[Letterhead]

County Court House - Fifth Floor - FOrest 3-2111
Sedgwick County - Wichita, Kansas 67203

February 7, 1968

Mr. C. Winthrop Forbish, Jr.
Project Inside-Out, Inc.
328-30th Avenue
San Francisco, California 94121

Re: John E. George
Warrant #64cr40

Dear Sir:

As you are aware, Mr. George was apprehended during a robbery of a finance company in San Francisco, California. He is charged here with robbing a finance company on the 4th day of November, 1963. He has had, from time to time, written to us, at first asserting his innocence, and as of late, asserting his potential to be a good member of society.

In October of 1967, I consulted with our Wichita Police Department as to the desire to continue in the prosecution in this case, and they indicated they did wish to continue in it and it is at this time my continued intent to prosecute Mr. George as soon as he is available to be returned to our city.

Yours truly,

/s/ DONALD FOSTER
Donald Foster
Deputy County Attorney.

DF/lkk

[Letterhead]

Department of Corrections
CALIFORNIA STATE PRISON
San Quentin, California 94964

April 21, 1967.
Re: GEORGE, John Edward
A-83856
Office of the Clerk
Superior Court
County of Gaston
Gastonia, North Carolina

Sir:

We are in receipt of your April 14, 1967 letter with regard to the above named subject presently confined to this institution.

The certified copy of Judgment of the Superior Court of Gaston County, North Carolina will be placed as a detainer, and your request for notification in advance of his release is noted in our records.

Please advise our office the name of the jurisdiction that should be notified, The State of North Carolina Prison Department, or the Office of the Sheriff, County of Gaston, Gastonia, North Carolina.

Your early reply will be appreciated, and be assured of our cooperation in matters of mutual concern.

Very truly yours,

LAWRENCE E. WILSON
Warden

/s/ W. C. SCHILLER
BY: W. C. SCHILLER
Records Officer

WCS:lr
cc: Martin R. Peterson
Prisoner Rehab Director
North Carolina Prison Department

Dear Mr. Schiller:

With regard to your letter of April 21, 1967, a copy of which appears above, notice of a release date and of details of assuming custody should be furnished both to the Sheriff of Gaston County and to the Clerk of Superior Court of Gaston County, at Gastonia, North Carolina.

Gastonia, N. C.,

April 29, 1967.

Very truly yours,

/s/. GEORGE C. HOLLAND
George C. Holland
Clerk of Superior Court

STATE OF NEVADA, }
County of Washoe. } ss.

HARRY Z. GUERIN being first duly sworn, deposes and says: That he is the duly qualified and acting Justice of the Peace of SPARKS Township, in and for the County of Washoe, State of Nevada; that the foregoing copy of complaint in the case of the State of Nevada vs. JOHN E. GEORGE, AKA JESSIE MOORE is a full, true and correct copy of the complaint in said case filed in my office on the 17th day of DECEMBER, 1963, and that the foregoing copy of the warrant of arrest in said case is a full, true and correct copy of the warrant issued by me upon the said complaint on the 17th day of DECEMBER, 1963, for the arrest of the said JOHN E. GEORGE, AKA JESSIE MOORE

Harry Z. Guerin

Subscribed and sworn to before me this 17th day of DECEMBER, 1963

H K Brown

County Clerk of Washoe County, and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

STATE OF NEVADA, }
County of Washoe. } ss.

I, H. K. BROWN, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that on the 17th day of DECEMBER, A. D. 1963, the said HARRY Z. GUERIN was, and now is at the date hereof, the duly qualified and acting Justice of the Peace of the Justice's Court of SPARKS Township, in and for the County of Washoe, State of Nevada, a court without a seal or a clerk thereof; and I further certify that I am well acquainted with the signature of the said HARRY Z. GUERIN, and that his signature subscribed to the foregoing certificate and affidavit is true and genuine.

RECEIVED

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Reno, on the 17th day of DECEMBER, 1963

H K Brown

County Clerk of Washoe County, and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

THE WITHIN INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.
ATTEST:
CALIFORNIA STATE PRISON AT SAN QUENTIN
BY M. S. Metzler
RECORDS OFFICER

THE STATE OF NEVADA, Plaintiff,

AGAINST

JOHN E. GEORGE, AKA JESSIE MOORE
Defendant

CRIMINAL COMPLAINT

Personally appeared before me this day SAM COSTA
of SPARKS Township, in the County of Washoe, State of Nevada, who complains and says that JOHN E. GEORGE, AKA JESSIE MOORE
the defendant above named, has committed the crime of ROBBERY
in the manner following, to-wit:

That the said defendant on or about the 22nd day of NOVEMBER, 1963 at ~~Reno~~ Sparks Township, in the County of Washoe, State of Nevada, did then and there wilfully unlawfully, feloniously and violently, and by means of force and violence, take and obtain from the person of RON CORNILLIES, the sum of Two Hundred Seventy One and no/100 ($271.00) Dollars, lawful money of the United States, which said money was the property of the Beneficial Finance Company of Sparks, Inc.

All of which is contrary to the form of Statute in such cases made and provided and against the peace and dignity of the State of Nevada. Said complainant therefore prays that a warrant be issued for the arrest of said defendant and that he may be dealt with according to law.

Subscribed and sworn to before me this 17th 13th day of DECEMBER, 1963

Harry Z. Gurrin
Justice of the Peace of Said Township.

THE WITHIN INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.
ATTEST:
CALIFORNIA STATE PRISON AT SAN QUENTIN
BY W. L. Metzler

64 CR 40

STATE OF KANSAS, SEDGWICK COUNTY, ss.

THE STATE OF KANSAS, to R. D. Stephens Marshal of the Court of Common Pleas, in and for said County.

WHEREAS, Complaint in writing, under oath, has been made in the Court of Common Pleas, Wichita, Sedgwick County, and it appearing that there are reasonable ground for believing that on or about the 4th day of November ,A.D., 1963 , in Sedgwick County, and State of Kansas, one JOHN EDWARD GEORGE A 83554 did then and there unlawfully, feloniously, wilfully

take the property of another, to-wit: $76.00 in United States Currency belonging to and being the property of Community Finance Company, Inc., 140 North Broadway, Wichita, Sedgwick County, Kansas, in the presence of and against the will of Charles L. Riggs, by putting him, the said Charles L. Riggs in fear of some immediate injury to his person;

all of the said acts of the said JOHN EDWARD GEORGE being

THE WITHIN INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.
ATTEST:
CALIFORNIA STATE PRISON AT SAN QUENTIN
BY M. S. Melcher RECORDS OFFICER
(AFFIX SEAL)

Contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Kansas. Section 21-527, 1949 G.S.K.

You are, therefore, commanded forthwith to arrest said JOHN EDWARD GEORGE and bring him before said Court, in said County to answer said charge; and then and there return this writ.

Witness my hand in Wichita, in Sedgwick County, Kansas.

this 6th day of January , 1964.

Ellen Hale

Clerk of the Court of Common Pleas, Wichita, Sedgwick County, Kansas.

By K. Angley, Deputy.

STATE OF KANSAS } SS
SEDGWICK COUNTY }

I, ELLEN HALE, Clerk of the Court of Common Pleas of Sedgwick County, Kansas, hereby certify that the within is a true, correct and complete copy of the original instrument filed in this office on the 6 day of Jan 19 64

Ellen Hale, Clerk

K. Angley Deputy

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David B. Frohnmayer
Attorney at Law
1900 Standard Oil Building
225 Bush Street
San Francisco, California 94104

March 7, 1969

John Edward George v. State of North Carolina, No. 22851

Honorable William B. Luck, Clerk
United States Court of Appeals
for the Ninth Circuit

Post Office Building
Seventh and Mission Streets
San Francisco, California 94101

Dear Mr. Luck:

I have just received a copy of the communication directed to your office by the Deputy Attorney General dated March 5, 1969.

This letter details certain material with which the Deputy Attorney General proposed at oral argument to amplify the record in the above-entitled case. The Court there stated that this material would be admitted at this late date only pursuant to my stipulation. By my letter dated March 4, 1969, on behalf of the petitioner I declined to stipulate to the admission of this material. I continue to adhere to this position. The material, in my estimation, is not only irrelevant, but does not comply in any event with the Federal Rules of Appellate Procedure regarding the appropriate contents of exhibits in briefs on appeal in cases of this sort.

Although there is nothing in the material forwarded to the Court which, properly considered, is prejudicial to the petitioner, even the most remote chance that these items might prejudice the petitioner in any manner would dictate that I register my continuing objection to the lodging of this material, formally or informally, with the Court in a manner contrary to the Court's directive.

Yours very truly,
David B. Frohnmayer
Attorney for Petitioner
Appellee

United State Court of Appeals

For The Ninth Circuit

No. 22,851

John Edward George,
Appellant,

vs.

Lewis S. Nelson, Warden, California State Prison, San Quentin; and Warden of North Carolina State Prison,
Appellees.

[May 9, 1969]

Appeal from the United States District Court
for the Northern District of California

Before: HAMLEY, HAMLIN and KOELSCH, Circuit Judges

HAMLEY, Circuit Judge:

John Edward George, in custody at California State Prison, San Quentin, appeals from a district court order denying his application for a writ of habeas corpus.

On April 27, 1964, George was convicted in a California state court, on a plea of guilty, of robbery in the first degree and began serving his sentence of five years to life at San Quentin. On July 20, 1966, George was released to North Carolina authorities to stand trial in that state upon a North Carolina robbery charge. This was done pursuant to California Penal Code section 1389 (1963), and North Carolina G.S. § 148-89, known as the interstate "Agreement on Detainers."

George was tried in Gaston County, North Carolina, on February 8, 1967, and was convicted on the North Carolina charge. He was sentenced to imprisonment for from twelve to fifteen years. The conviction was thereafter affirmed. *State v. George,* 271 N.C. 438, 156 S.E. 2d 845.

However, George did not begin service of the North Carolina sentence. He was returned to San Quentin to complete service of his California sentence after which he is to serve his North Carolina sentence. On April 14, 1967, North Carolina authorities wrote to San Quentin, placing a detainer on George so that he would in due course be returned to North Carolina for this purpose.

In his habeas corpus application thereafter filed in the United State District Court for the Northern District of California, George did not attack his California conviction, but rather challenged the North Carolina conviction. He alleged, in effect, that: (1) in the North Carolina prosecution he was not tried within the period permissible under the California and North Carolina detainer statutes, and the North Carolina court was therefore without jurisdiction, this constituting a denial of due process; (2) he was denied his constitutional right to a speedy trial in North Carolina; and (3) he was convicted on testimony known by North Carolina prosecuting officials to be perjured.[1] George asserted in his application that he wanted the validity of the North Carolina conviction determined now because it, together with the North Carolina detainer, adversely affects favorable consideration of parole and reduced custodial classification by California authorities.

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[1]George alleged that he presented the first two of these grounds for relief in his direct appeal in North Carolina. He did not allege in his application that he presented the perjury ground in any North Carolina state court proceeding.

On March 1 and 20, 1968, the district court denied the application for a writ on the ground that *McNally v. Hill*, 293 U.S. 131, foreclosed habeas corpus relief on the North Carolina conviction while George was still in custody under the prior California judgment. George appealed to this court on April 3, 1968.

On May 20, 1968, the United States Supreme Court in *Peyton v. Rowe*, 391 U.S. 54, overruled *McNally v. Hill*. The Supreme Court held that a prisoner serving consecutive sentences is "in custody" under any one of them for purposes of 28 U.S.C. § 2241 (c)(3) (1964), and may, in a federal habeas corpus proceeding thereunder, challenge the constitutionality of a sentence scheduled for future service.

George then moved in this court for an order remanding the cause to the district court for further proceedings in the light of *Peyton v. Rowe*. In a supplemental brief thereafter filed George in effect asserted, as an additional reason why the validity of the North Carolina conviction should be determined at this time, that a delay in making this determination will lessen the chance that substantial justice will be done with regard to the North Carolina conviction.[2]

The California warden opposed the motion to remand, arguing that he is not a proper party insofar as George is challenging the North Carolina conviction, and that an appropriate North Carolina party is an indispensable party.[3]

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[2]George thereby invoked the reasons stated in *Peyton v. Rowe*, 391 U.S. 54, 62, 64 (the dimming of memories, death of witnesses, and incarceration when entitled to release) why habeas applicants are entitled to attack all outstanding convictions without delay.

[3]While George named the "Warden, North Carolina State Prison (Name Unknown)" as a respondent in his amended application in this habeas corpus proceeding, there is nothing in the record before us to indicate that process has been served upon the North Carolina warden.

The California warden further argued that the United States District Court for the Northern District of California did not have jurisdiction to entertain this habeas proceeding. We passed consideration of the motion to the hearing of the appeal on the merits.

In *Peyton v. Rowe,* the consecutive or successive sentences were imposed by the same sovereign. Here the first sentence was imposed against George by a California court, and the second was imposed by a North Carolina court. However, the rule established in *Rowe* that a federal habeas applicant may attack the validity of a second sentence without awaiting completion of service of the first sentence, applies even though the two sentences were imposed by different sovereigns. *Word v. North Carolina,* 4 Cir., 406 F.2d 352, 355; *United States ex rel. Van Scoten v. Commonwealth of Pennsylvania,* 3 Cir., 404 F.2d 767, 768.

This brings us to the question of whether, under the circumstances of this case, a habeas proceeding should be entertained in the district of confinement (California) or in the district of sentencing (North Carolina).

Since George is in state custody in the Northern District of California, we think that district court has jurisdiction to entertain the habeas application. Title 28 U.S.C. § 2241(a) provides that writs of habeas corpus may be granted by the district courts "within their respective jurisdictions." In *Ahrens v. Clark,* 335 U.S. 188, the Supreme Court held that this phrase means the district in which the petitioner is detained or confined when the petition is filed.[4] See Also, *Ashley v. Washington,* 9 Cir., 394 F.2d 125, 126.

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[4]As observed by the Fourth Circuit in *Word v. North Carolina,* 406 F.2d 352, this rule of *Ahrens* has been departed from in the case of applicants resident outside of the United States, and perhaps in certain other exceptional circumstances.

It is also our view that, while the challenged judgment is that of North Carolina, the California warden is a proper respondent. He is the actual custodian of George by reason of the California conviction and also as agent of the North Carolina warden, as evidenced by the detainer. If the California warden does not wish to defend the North Carolina conviction he can call upon the authorities of North Carolina to provide that defense.

In holding that the California district court has jurisdiction, we have not overlooked the fact that the Fourth Circuit, in *Word v. North Carolina,* 4 Cir., 406 F.2d 352, has reached a contrary result. The *Word* court affirmed the dismissal of two habeas applications filed in a Virginia district court by Virginia prisoners challenging North Carolina convictions. In doing so, however, the Fourth Circuit did not seem to announce a categorical rule that a district court in the district of custody could never assume jurisdiction. Instead, it said ". . . the latter, where permissible [is] infrequently preferable."

We recognize that, under the law of the Fourth Circuit, as established in the *Word* decision, a federal district court in North Carolina could have entertained George's application. It was there held that a North Carolina district court should not have dismissed, on jurisdictional grounds, the habeas application of a Virgina prisoner who sought to set aside a North Carolina conviction.[5] But the problem before us is

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[5]The rule is to the contrary in the Ninth Circuit. In *Ashley v. Washington,* 9 Cir., 394 F.2d 125, this court held that a state prisoner in Florida custody under a Florida judgment, faced with a detainer filed by the State of Washington, could not challenge the Washington conviction upon which the detainer was based, in a habeas proceeding brought in a Washington district court. To like effect, see *Van Scoten v. Commonwealth of Pennsylvania,* 3 Cir., 404 F.2d 767.

not whether a district court in North Carolina could have entertained George's application, but whether the district court in California, where the application was filed, had jurisdiction. We do not now pass upon the question of whether the California district court may, after this remand, transfer the cause to the North Carolina district court pursuant to 28 U.S.C. § 1404(a) (1964).

It cannot be denied that the entertaining of such proceedings in the state of confinement rather than the state where the challenged conviction was obtained presents practical problems. But, likewise, a rule requiring the prisoner to seek relief in the latter state presents practical problems. They are discussed at some length in the opinions filed in *Word v. North Carolina*. We do not see how a disposition of this appeal can avoid one set of problems or the other. Perhaps new judicially or legislatively-fashioned techniques are needed to meet these problems, now that *Peyton v. Rowe* has assured state prisoners an immediate right to attack convictions not yet being served. But all that is presented to us at this time are the questions of California district court jurisdiction and indispensability of parties.

Reversed and remanded for further proceedings.

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Wednesday, June 18th, 1969

Before: HAMLEY, HAMLIN and KOELSCH, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellee's filed May 23, 1969 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied, and suggestion for rehearing en banc is rejected.

[Letterhead]

BROBECK, PHLEGER & HARRISON
Attorneys at Law
One Eleven Sutter Street
San Francisco 94104
(415) 434-0900

December 24, 1969

Mrs. Louise H. Renne, Esq.
Deputy Attorney General
6000 State Building
San Francisco, California 94102.

Re: Nelson v. George, U.S. Sup. Ct.
Oct. Term 1969, No. 595

Dear Mrs. Renne:

I have your letter of December 18, 1969, and the accompanying list of documents designated by petitioner for inclusion in the Single Appendix to be prepared in this case. I know of no other documents of record that need be designated.

However, I note that you have also designated certain documents that were merely lodged with the Court of Appeals, *viz.*, those designated as

> "4. Letter dated March 5, 1969 from counsel for appellee Nelson to Clerk, Court of Appeal, with *accompanying documents* which were lodged with Court on March 6, 1969."

We have previously discussed this matter and I believe we are in agreement that, so far as is known, these documents are not a part of the record in the Court of Appeals. Accordingly, I must object to the inclusion in the Single Appendix of these documents *dehors* the record below.

In order that this objection be reflected in the materials before the Supreme Court, respondent cross-designates this letter for inclusion in the Single Appendix.

Very truly yours,
/s/ George A. Cumming, Jr.
George A. Cumming, Jr.

GAC:jt
cc: David B. Frohamayer, Esq.
Mr. John E. George
Mrs. Helen K. Loughran